United Nations A/CN.4/L.918/Add.1

General Assembly

Distr.: Limited
27 June 2018

Original: English

International Law Commission
Seventieth Session
New York, 30 April–1 June and Geneva, 2 July–10 August 2018

Draft report of the International Law Commission on the work of its seventieth session

Rapporteur: Ms. Patrícia **Galvão Teles**

Chapter V
Identification of customary international law

Addendum

Contents

Page

E. Text of the draft conclusions on identification of customary international law .....

2. Text of the draft conclusions and commentaries thereto .....

GE.18-10540 (E) 110718

1810540

Please recycle

E. Text of the draft conclusions on identification of customary international law

2. Text of the draft conclusions and commentaries thereto

1. The text of the draft conclusions, together with commentaries thereto, adopted by the Commission on second reading, is reproduced below.

Identification of customary international law

General commentary

(1) The present draft conclusions concern the methodology for identifying rules of customary international law. They seek to offer practical guidance on how the existence of rules of customary international law, and their content, are to be determined. This is not only of concern to specialists in public international law: others, including those involved with national courts, are increasingly called upon to identify rules of customary international law. In each case, a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination as well as that of customary international law more broadly.

(2) As is always the case with the Commission's output, the draft conclusions are to be read together with the commentaries.

(3) Customary international law is unwritten law deriving from practice accepted as law. It remains an important source of public international law,[1] and can be an effective means for subjects of international law to regulate their behaviour. Customary international law is among the sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice, which refers, in subparagraph (b), to "international custom, as evidence of a general practice accepted as law".[2] This wording reflects the two constituent elements of customary international law: a general practice and its acceptance as law (the latter often referred to as *opinio juris*).

---

[1] Some important fields of international law are still governed essentially by customary international law, with few if any applicable treaties. Even where there is a treaty in force, the rules of customary international law continue to govern questions not regulated by the treaty and continue to apply in relations with and among non-parties to the treaty. In addition, treaties may refer to rules of customary international law; and such rules may be taken account in treaty interpretation in accordance with article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331 ("1969 Vienna Convention")). Moreover, it may sometimes be necessary to determine the law applicable at the time when certain acts occurred ("the intertemporal law"), which may be customary international law even if a treaty is now in force. In any event, a rule of customary international law may continue to exist and be applicable, separately from a treaty, even where the two have the same content and even among parties to the treaty (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 93–96, paras. 174–179; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, at pp. 47–48, para. 88).

[2] This wording was proposed by the Advisory Committee of Jurists, established by the League of Nations in 1920 to prepare a draft statute for the Permanent Court of International Justice; it was retained, without change, in the Statute of the International Court of Justice in 1945. While the drafting has been criticized as imprecise, the formula is nevertheless widely considered as capturing the essence of customary international law.

(4) The identification of customary international law is a matter on which there is a wealth of material, including case law and scholarly writings.[3] The draft conclusions reflect the approach adopted by States, as well as by international courts and organizations and most authors. Recognizing that the process for the identification of customary international law is not always susceptible to exact formulations, the draft conclusions aim to offer clear guidance without being overly prescriptive.

(5) The 16 draft conclusions are divided into seven parts. Part One deals with scope and purpose. Part Two sets out the basic approach to the identification of customary international law, the "two-element" approach. Parts Three and Four provide further guidance on the two constituent elements of customary international law, which also serve as the criteria for its identification: "a general practice" and "acceptance as law" (*opinio juris*). Part Five addresses certain categories of materials that are frequently invoked in the identification of rules of customary international law. Whereas rules of customary international law are usually binding on all States, Parts Six and Seven deal with two exceptional cases: the persistent objector rule; and particular customary international law (rules that apply only among a limited number of States).

Part One
Introduction

Part One, comprising a single draft conclusion, defines the scope of the draft conclusions, outlining their function and purpose.

Conclusion 1
Scope

The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined.

Commentary

(1) Draft conclusion 1 is introductory in nature. It provides that the draft conclusions concern the way in which rules of customary international law are to be determined, that is, the legal methodology for undertaking that exercise.

(2) The term "customary international law" is used throughout the draft conclusions, being in common use and most clearly reflecting the nature of this source of international law. Other terms that are sometimes found in legal instruments, in case law and in scholarly writings include "custom", "international custom", and "international customary law" as well as "the law of nations" and "general international law".[4]

(3) The reference to "rules" of customary international law in the present draft conclusions and commentaries includes rules of customary international law that may be referred to as "principles" because of their more general and more fundamental character.[5]

---

[3] The present commentary does not contain references to scholarly writings in the field, though they may be useful (and were referred to extensively in the Special Rapporteur's reports). For a bibliography, including sections that correspond to issues covered by individual draft conclusions, as well as sections addressing customary international law in various fields, see annex II to the fifth report (A/CN.4/717/Add.1).

[4] Some of these terms may be used in other senses; in particular, "general international law" is used in various ways (not always clearly specified) including to refer to rules of international law of general application, whether treaty law or customary international law or general principles of law. For a judicial discussion of the term "general international law" see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015*, p. 665, at p. 782 (separate opinion of Judge Donoghue, para. 2) and pp. 846–849 (separate opinion of Judge *ad hoc* Dugard, paras. 12–17).

[5] See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at pp. 288–290, para. 79 ("the association of the terms 'rules' and 'principles' is no more than the use of a dual expression to convey one and the same idea, since in this context [of defining the applicable international law] 'principles' clearly means principles of law, that is, it also

(4) The terms "identify" and "determine" are used interchangeably in the draft conclusions and commentaries. The reference to determining the "existence and content" of rules of customary international law reflects the fact that while often the need is to identify both the existence and the content of a rule, in some cases it is accepted that the rule exists but its precise content is disputed. This may be the case, for example, where the question arises as to whether a particular formulation (usually set out in texts such as treaties or resolutions) does in fact correspond precisely to an existing rule of customary international law, or whether there are exceptions to a recognized rule of customary international law.

(5) Dealing as they do with the identification of rules of customary international law, the draft conclusions do not address, directly, the processes by which customary international law develops over time. Yet in practice identification cannot always be considered in isolation from formation; the identification of the existence and content of a rule of customary international law may well involve consideration of the processes by which it has developed. The draft conclusions thus inevitably refer in places to the formation of rules of customary international law. They do not, however, deal systematically with how such rules emerge, or how they change or terminate.

(6) A number of other matters fall outside the scope of the draft conclusions. First, they do not address the substance of customary international law: they are concerned only with the methodological issue of how rules of customary international law are to be identified.[6] Second, no attempt is made to explain the relationship between customary international law and other sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice (international conventions, whether general or particular, and general principles of law); the draft conclusions touch on the matter only in so far as is necessary to explain how rules of customary international law are to be identified. Third, the draft conclusions are without prejudice to questions of hierarchy among rules of international law, including those concerning peremptory norms of general international law (*jus cogens*), or questions concerning the *erga omnes* nature of certain obligations. Finally, the draft conclusions do not address the position of customary international law within national legal systems, including the question of a possible burden of proof of customary international law.

Part Two
Basic approach

Part Two sets out the basic approach to the identification of customary international law. Comprising two draft conclusions, it specifies that determining a rule of customary international law requires establishing the existence of two constituent elements: a general practice, and acceptance of that practice as law (*opinio juris*). This requires a careful analysis of the evidence for each element.

Conclusion 2
Two constituent elements

To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

Commentary

(1) Draft conclusion 2 sets out the basic approach, according to which the identification of a rule of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice, and whether such general practice is accepted

---

includes rules of international law in whose case the use of the term 'principles' may be justified because of their more general and more fundamental character"). Such principles of customary international law are distinct from "general principles of law" within the meaning of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.

[6] Thus, reference in these commentaries to particular decisions of courts and tribunals is made in order to illustrate the methodology of the decisions, not for their substance.

as law (that is, accompanied by *opinio juris*[7]). In other words, one must look at what States actually do and seek to determine whether they recognize an obligation or a right to act in that way. This methodology, the "two-element approach", underlies the draft conclusions and is widely supported by States, in case law, and in scholarly writings. It serves to ensure that the exercise of identifying rules of customary international law results in determining only such rules as actually exist.[8]

(2) A general practice and acceptance of that practice as law (*opinio juris*) are the two constituent elements of customary international law; together they are the essential conditions for the existence of a rule of customary international law. The identification of such a rule thus involves a careful examination of available evidence to establish their presence in any given case. This has been confirmed, *inter alia*, in the case law of the International Court of Justice, which refers to "two conditions [that] must be fulfilled"[9] and has repeatedly laid down that "the existence of a rule of customary international law requires that there be "a settled practice" together with *opinio juris*".[10] To establish that a claim concerning the existence and/or the content of a rule of customary international law is well-founded thus entails a search for a practice that has gained such acceptance among States that it may be considered to be the expression of a legal right or obligation (namely, that it is required, permitted or prohibited as a matter of law).[11] The test must always be: is there a general practice that is accepted as law?

(3) Where the existence of a general practice accepted as law cannot be established, the conclusion will be that the alleged rule of customary international law does not exist. In the *Colombian-Peruvian asylum case*, for example, the International Court of Justice considered that the facts relating to the alleged existence of a rule of (particular) customary international law disclosed

> so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.[12]

---

[7] The Latin term has been retained in the draft conclusions and commentaries alongside "acceptance as law" because of its prevalence in legal discourse (including in the case law of the International Court of Justice), and also because it may capture better the particular nature of the subjective element of customary international law as referring to legal conviction and not to formal consent.

[8] The shared view of parties to a case is not sufficient; it must be ascertained that a general practice that is accepted as law actually exists. See also *Military and Paramilitary Activities in and against Nicaragua* (see footnote 1 above), at pp. 97–98, para. 184 ("Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice").

[9] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77.

[10] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at pp. 122–123, para. 55; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at pp. 29–30, para. 27; and *North Sea Continental Shelf* (see footnote above), at p. 44, para. 77.

[11] For example, in the *Jurisdictional Immunities of the State* case, an extensive survey of the practice of States in the form of national legislation, judicial decisions, and claims and other official statements, which was found to be accompanied by *opinio juris*, served to identify the scope of State immunity under customary international law (*Jurisdictional Immunities of the State* (see footnote 10 above), at pp. 122–139, paras. 55–91).

[12] *Colombian-Peruvian asylum case, Judgment of 20 November 1950, I.C.J. Reports 1950*, p. 266, at p. 277.

(4) As draft conclusion 2 makes clear, the presence of only one constituent element does not suffice for the identification of a rule of customary international law. Practice without acceptance as law (*opinio juris*), even if widespread and consistent, can be no more than a non-binding usage, while a belief that something is (or ought to be) the law unsupported by practice is mere aspiration; it is the two together that establish the existence of a rule of customary international law.[13] While writers have from time to time sought to devise alternative approaches to the identification of customary international law, emphasizing one constituent element over the other or even excluding one element altogether, such theories have not been adopted by States or in the case law.

(5) The two-element approach is often referred to as "inductive", in contrast to possible "deductive" approaches by which rules might be ascertained other than by empirical evidence of a general practice and its acceptance as law (*opinio juris*). The two-element approach does not in fact preclude a measure of deduction as an aid, to be employed with caution, in the application of the two-element approach, in particular when considering possible rules of customary international law that operate against the backdrop of rules framed in more general terms that themselves derive from and reflect a general practice accepted as law,[14] or when concluding that possible rules of international law form part of an "indivisible regime".[15]

(6) The two-element approach applies to the identification of the existence and content of rules of customary international law in all fields of international law. This is confirmed in the practice of States and in the case law, and is consistent with the unity and coherence of international law, which is a single legal system and is not divided into separate branches each with its own approach to sources.[16] While the application in practice of the basic approach may well take into account the particular circumstances and context in which an alleged rule has arisen and operates,[17] the essential nature of customary international law as a general practice accepted as law (accompanied by *opinio juris*) must always be respected.

Conclusion 3
Assessment of evidence for the two constituent elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found.

---

[13] In the *Right of Passage* case, for example, the Court found that there was nothing to show that the recurring practice of passage through Indian territory of Portuguese armed forces and armed police between Daman and the Portuguese enclaves in India, or between the enclaves themselves, was permitted or exercised as of right. The Court explained that: "Having regard to the special circumstances of the case, this necessity for authorization before passage could take place constitutes, in the view of the Court, a negation of passage as of right. The practice predicates that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It is argued that permission was always granted, but this does not, in the opinion of the Court, affect the legal position. There is nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation" (*Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at pp. 40–43). In *Legality of the Threat or Use of Nuclear Weapons*, the Court considered that: "The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 255, para. 73). See also *Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), decision on preliminary motion based on lack of jurisdiction (child recruitment) of 31 May 2004*, Special Court for Sierra Leone, p. 13, para. 17.

[14] This appears to be the approach in *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at pp. 55–56, para. 101.

[15] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 624, at p. 674, para. 139.

[16] See also conclusions of the work of the Study Group on fragmentation of international law, *Yearbook of the International Law Commission 2006*, vol. II (Part Two), para. 251 (1).

[17] See draft conclusion 3 below

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

Commentary

(1) Draft conclusion 3 concerns the assessment of evidence for the two constituent elements of customary international law.[18] It offers general guidance for the process of determining the existence and content of a rule of customary international law from the various pieces of evidence available at the time of the assessment, which reflects both the systematic and rigorous analysis required and the dynamic nature of customary international law as a source of international law.

(2) Paragraph 1 sets out an overarching principle that underlies all of the draft conclusions, namely that the assessment of any and all available evidence must be careful and contextual. Whether a general practice that is accepted as law (accompanied by *opinio juris*) exists must be carefully investigated in each case, in the light of the relevant circumstances.[19] Such analysis not only promotes the credibility of any particular decision, but also allows the two-element approach to be applied, with the necessary flexibility, in all fields of international law.

(3) The requirement that regard be had to the overall context reflects the need to apply the two-element approach while taking into account the subject matter that the alleged rule is said to regulate. This implies that in each case any underlying principles of international law that may be applicable to the matter ought to be taken into account.[20] Moreover, the type of evidence consulted (and consideration of its availability or otherwise) depends on the circumstances, and certain forms of practice and certain forms of evidence of acceptance as law (*opinio juris*) may be of particular significance, according to the context. For example, in the *Jurisdictional Immunities of the State* case, the International Court of Justice considered that

> [i]n the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention [on Jurisdictional Immunities of States and Their Property]. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States

[18] The term "evidence" is used here as a broad concept relating to all the materials that may be considered as a basis for the identification of customary international law, not in any technical sense as used by particular courts or in particular legal systems.

[19] See also *North Sea Continental Shelf* (footnote 9 above), dissenting opinion of Judge Tanaka, at p. 175: "To decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter. The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances."

[20] In the *Jurisdictional Immunities of the State* case, the International Court of Justice considered that the customary rule of State immunity derived from the principle of sovereign equality of States and, in that context, had to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory (*Jurisdictional Immunities of the State* (see footnote 10 above), at pp. 123–124, para. 57). See also *Certain Activities carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River* (footnote 4 above), separate opinion of Judge Donoghue (paras. 3–10). It has also been explained that "a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part" (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73, at p. 76, para. 10).

> granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States.[21]

(4) The nature of the rule in question may also be of significance when assessing evidence for the purpose of ascertaining whether there is a general practice that is accepted as law (accompanied by *opinio juris*). In particular, where prohibitive rules are concerned (for example, the prohibition of torture) it may be difficult to find much affirmative State practice (as opposed to deliberate inaction[22]); cases involving such rules are more likely turn on evaluating whether the inaction is accepted as law.

(5) Given that conduct may be fraught with ambiguities, paragraph 1 further indicates that regard must be had to the particular circumstances in which any evidence is to be found; only then may proper weight be accorded to it. In the *United States Nationals in Morocco* case, for example, the International Court of Justice, in seeking to ascertain whether a rule of (particular) customary international law existed, said:

> There are isolated expressions to be found in the diplomatic correspondence which, if considered without regard to their context, might be regarded as acknowledgments of United States claims to exercise consular jurisdiction and other capitulatory rights. On the other hand, the Court can not ignore the general tenor of the correspondence, which indicates that at all times France and the United States were looking for a solution based upon mutual agreement and that neither Party intended to concede its legal position.[23]

Similarly, when considering legislation as practice, what may sometimes matter more than the actual text is how it has been interpreted and applied. Decisions of national courts will count less if they are reversed by the legislature or remain unenforced because of concerns about their compatibility with international law. Statements made casually, or in the heat of the moment, will usually carry less weight than those that are carefully considered; those made by junior officials may carry less weight than those voiced by senior members of the Government. The significance of a State's failure to protest will depend upon all the circumstances, but may be particularly significant where concrete action has been taken, of which that State is aware and which has an immediate negative impact on its interests. Practice of a State that goes against its clear interests or entails significant costs for it is more likely to reflect acceptance as law.

(6) Paragraph 2 states that to identify the existence and content of a rule of customary international law each of the two constituent elements must be found to be present, and explains that this calls for an assessment of evidence for each element. In other words, while practice and acceptance as law (*opinio juris*) together supply the information necessary for the identification of customary international law, two distinct inquiries are to be carried out. The constituent elements may be intertwined in fact (in the sense that

---

[21] *Jurisdictional Immunities of the State* (see footnote 10 above), at p. 123, para. 55. In the *Navigational and Related Rights* case, where the question arose whether long-established practice of fishing for subsistence purposes (acknowledged by both parties to the case) has evolved into a rule of (particular) customary international law, the International Court of Justice observed that "the practice, by its very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record. For the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant" (*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at pp. 265–266, para. 141). The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has noted the difficulty of observing State practice on the battlefield: *Prosecutor v. Tadić, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995*, para. 99.

[22] On inaction as a form of practice see draft conclusion 6, below, and paragraph (3) of the commentary thereto.

[23] *Case concerning rights of nationals of the United States of America in Morocco, Judgment of 27 August 1952, I.C.J. Reports 1952*, p. 176, at p. 200.

practice may be accompanied by a certain motivation), but each is conceptually distinct for purposes of identifying a rule of customary international law.

(7) Although customary international law manifests itself in instances of conduct that are accompanied by *opinio juris*, acts forming the relevant practice are not as such evidence of acceptance as law. Moreover, acceptance as law is to be sought with respect not only to those taking part in the practice but also to those in a position to react to it.[24] No simple inference of acceptance as law may thus be made from the practice in question; in the words of the International Court of Justice, "acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature".[25]

(8) Paragraph 2 emphasizes that the existence of one element may not be deduced merely from the existence of the other, and that a separate inquiry needs to be carried out for each. Nevertheless, the paragraph does not exclude that the same material may be used to ascertain practice and acceptance as law (*opinio juris*). A decision by a national court, for example, could be relevant practice as well as indicate that its outcome is required under customary international law. Similarly, an official report issued by a State may serve as practice (or contain information as to that State's practice) as well as attest to the legal views underlying it. The important point remains, however, that the material must be examined as part of two distinct inquiries, to ascertain practice and to ascertain acceptance as law.

(9) While in the identification of a rule of customary international law the existence of a general practice is often the initial factor to be considered, and only then is an inquiry made into whether such general practice is accepted as law, this order of examination is not mandatory. Thus, the identification of a rule of customary international law may also begin with appraising a written text allegedly expressing a widespread legal conviction and then seeking to verify whether there is a general practice corresponding to it.

Part Three
A general practice

As stated in draft conclusion 2, above, the indispensable requirement for the identification of a rule of customary international law is that both a general practice and acceptance of such practice as law (*opinio juris*) be ascertained. Part Three offers more detailed guidance on the first of these two constituent elements of customary international law, "a general practice". Also known as the "material" or "objective" element,[26] it refers to those instances of conduct that (when accompanied by acceptance as law) are creative, or expressive, of customary international law. A number of factors must be considered in evaluating whether a general practice does in fact exist.

---

[24] See also paragraph (5) of the commentary to draft conclusion 9, below.

[25] *North Sea Continental Shelf* (see footnote 9 above), at p. 44, para. 76. In the *Lotus* case, the Permanent Court of International Justice likewise held that: "Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged ... it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty" (*The Case of the S.S. "Lotus", P.C.I.J., Series A*, No. 10 (1927), p. 28). See also draft conclusion 9, paragraph 2, below.

[26] Sometimes also referred to as *usus* (usage), but this may lead to confusion with "mere usage or habit", which is to be distinguished from customary international law: see draft conclusion 9, paragraph 2, below.

Conclusion 4
Requirement of practice

1. The requirement of a general practice, as a constituent element of customary international law, refers primarily the practice of States that contributes to the formation, or expression, of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Commentary

(1) Draft conclusion 4 specifies whose practice is to be taken into account when determining the existence and content of rules of customary international law.

(2) Paragraph 1 makes clear that it is primarily the practice of States that is to be looked to in determining the existence and content of rules of customary international law: the material element of customary international law is indeed often referred to as "State practice".[27] Being the primary subjects of the international legal system and possessing a general competence, States play a pre-eminent role in the formation of customary international law, and it is principally their practice that has to be examined in identifying it. Indeed, in many cases, it will only be State practice that is relevant for determining the existence and content of rules of customary international law. As the International Court of Justice stated in *Military and Paramilitary Activities in and against Nicaragua*, in order "to consider what are the rules of customary international law applicable to the present dispute … it has to direct its attention to the practice and *opinio juris* of States".[28]

(3) The word "primarily" serves a dual purpose. In addition to emphasizing the primary role of State practice in the formation and expression of rules of customary international law, it serves to refer the reader to the other practice that may be relevant in this context, which is the subject of paragraph 2.

(4) Paragraph 2 indicates that "[i]n certain cases", the practice of international organizations also contributes to the formation and expression of rules of customary international law.[29] While international organizations often serve as arenas or catalysts for the practice of States, the paragraph deals with practice that is attributed to international organizations themselves, not practice of States acting within or in relation to them (which is attributed to the States concerned).[30] In those cases where the practice of international organizations themselves is of relevance (as described below), references in the draft conclusions and commentaries to the practice of States should be read as including, *mutatis mutandis*, the practice of international organizations.

---

[27] State practice serves other important functions in public international law, including in relation to treaty interpretation, but these are not within the scope of the present draft conclusions.

[28] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 1 above), at p. 97, para. 183. In the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, the Court similarly stated that "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States …" (*Continental Shelf (Libyan Arab Jamahiriya/Malta)* (see footnote 10 above), at p. 29, para. 27); and in the *Jurisdictional Immunities of the State* case, the Court again confirmed that it is "State practice from which customary international law is derived" (*Jurisdictional Immunities of the State* (see footnote 10 above), at p. 143, para. 101).

[29] The term "international organizations" refers, in these draft conclusions, to organizations that are established by instruments governed by international law (usually treaties), and possess their own international legal personality. The term does not include non-governmental organizations.

[30] See draft conclusions 6, 10 and 12, below, which refer, *inter alia*, to the practice, and acceptance as law, of States within international organizations.

(5) International organizations are not States.[31] They are entities established and empowered by States (or by States and/or other international organizations) to carry out certain functions, and to that end have international legal personality, that is, they have their own rights and obligations under international law. The practice of international organizations in international relations[32] (when accompanied by *opinio juris*) may count as practice that gives rise or attests to rules of customary international law, but only those rules (*a*) whose subject matter falls within the mandate of the organizations, and/or (*b*) that are addressed specifically to them (such as those on their international responsibility or relating to treaties to which international organizations may be parties). The words "in certain cases" in paragraph 2 indeed serve to indicate that the practice of international organizations will not be relevant to the identification of all rules of customary international law, and further that it may be the practice of only some, not all, international organizations that is relevant.

(6) Within this framework, the practice falling under paragraph 2 arises most clearly where member States have transferred exclusive competences to the international organization, so that the latter exercises some of the public powers of its member States and hence the practice of the organization may be equated with the practice of those States. This is the case, for example, for certain competences of the European Union. Practice within the scope of paragraph 2 may also arise where member States have not transferred exclusive competences, but have conferred competences upon the international organization that are functionally equivalent to powers exercised by States. Thus the practice of international organizations when serving as treaty depositaries, in deploying military forces (for example, for peacekeeping), in administering territories, or in taking positions on the scope of the privileges and immunities of the organization and its officials, may contribute to the formation, or expression, of rules of customary international law in those areas.[33]

(7) At the same time, caution is required in assessing the weight of the practice of an international organization as part of a general practice. International organizations vary greatly, not just in their powers, but also in their membership and functions. As a general rule, the more directly a practice of an international organization is carried out on behalf of its member States or endorsed by them, and the larger the number of such member States, the greater weight it may have in relation to the formation, or expression, of rules of customary international law. Among other factors that may need to be considered in weighing the practice are: the nature of the organization; the nature of the organ whose

---

[31] See also the articles on the responsibility of international organizations adopted by the Commission in 2011, paragraph (7) of the general commentary: "International organizations are quite different from States, and in addition present great diversity among themselves. In contrast with States, they do not possess a general competence and have been established in order to exercise specific functions ('principle of speciality'). There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound" (*Yearbook ... 2011*, vol. II (Part Two), p. 47). See also *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 178 ("The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights").

[32] "Established practice" of the organization (that is, practice forming part of the rules of the organization within the meaning of article 2, paragraph 1 (*j*), of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations) is not within the scope of the present conclusions.

[33] In this vein, the Standard Terms and Conditions for loan, guarantee and other financing agreements of the European Bank for Reconstruction and Development and the General Conditions for Sovereign-backed Loans of the Asian Infrastructure Investment Bank both recognize that the sources of public international law that may be applicable in the event of dispute between the Bank and a party to a financing agreement include, *inter alia*, "… forms of international custom, including the practice of states *and international financial institutions* of such generality, consistency and duration as to create legal obligations" (European Bank for Reconstruction and Development, Standard Terms and Conditions (1 December 2012), Sect. 8.04(b)(vi)(C); Asian Infrastructure Investment Bank, General Conditions for Sovereign-backed Loans (1 May 2016), Sect. 7.04(vii)(c) (emphasis added)).

conduct is under consideration; whether the conduct is *ultra vires* the organization or organ; and whether the conduct is consonant with that of the member States of the organization.

(8) Paragraph 3 makes explicit that the conduct of entities other than States and international organizations — for example, non-governmental organizations and private individuals, but also transnational corporations and non-State armed groups — is neither creative nor expressive of customary international law. As such, their conduct does not contribute to the formation, or expression, of rules of customary international law, and may not serve as direct (primary) evidence of the existence and content of such rules. The paragraph recognizes, however, that such conduct may have an indirect role in the identification of customary international law, by stimulating or recording the practice and acceptance as law (*opinio juris*) of States and international organizations.[34] For example, the acts of private individuals may sometimes be relevant to the formation or expression of rules of customary international law, but only to the extent that States have endorsed or reacted to them.[35]

(9) Official statements of the International Committee of the Red Cross (ICRC), such as appeals for and memorandums on respect for international humanitarian law, may likewise play an important role in shaping the practice of States reacting to such statements; and publications of the ICRC may assist in identifying relevant practice. Such activities may thus contribute to the development and determination of customary international law, but they are not practice as such.[36]

Conclusion 5
Conduct of the State as State practice

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

Commentary

(1) Although in their international relations States most frequently act through the executive branch, draft conclusion 5 explains that State practice consists of any conduct of the State, whatever the branch concerned and functions at issue. In accordance with the principle of the unity of the State, this includes the conduct of any organ of the State forming part of the State's organization and acting in that capacity, whether in exercise of executive, legislative, judicial or "other" functions, such as commercial activities or the giving of administrative guidance to the private sector.

(2) To qualify as State practice, the conduct in question must be "of the State". The conduct of any State organ is to be considered conduct of that State, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. An organ includes any person or entity that has that status in accordance with the internal law of the State; the conduct of a person or entity otherwise empowered by the law of the State to exercise elements of governmental authority is also conduct "of the State", provided the person or entity is acting in that capacity in the particular instance.[37]

---

[34] In the latter capacity their output may fall within the ambit of draft conclusion 14, below. The Commission has considered a similar point with respect to practice by "non-State actors" under its topic "Subsequent agreements and subsequent practice in relation to interpretation of treaties": see draft conclusion 5, paragraph 2, adopted on second reading under that topic, above.

[35] See, for example, *Dispute regarding Navigational and Related Rights* (footnote 21 above), at pp. 265–266, para. 141.

[36] This is without prejudice to the significance of acts of the ICRC in exercise of specific functions conferred upon it, in particular by the 1949 Geneva Conventions for the protection of war victims.

[37] See articles 4 and 5 of the articles on the responsibility of States for internationally wrongful acts, General Assembly resolution 56/83 of 12 December 2001, annex. For the draft articles adopted by the Commission and the commentaries thereto, see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

(3) The relevant practice of States is not limited to conduct *vis-à-vis* other States or other subjects of international law; conduct within the State, such as a State's treatment of its own nationals, may also relate to matters of international law.

(4) State practice may be that of a single State or of two or more States acting together. Examples of practice of the latter kind may include joint action by several States patrolling the high seas to combat piracy or cooperating in launching a satellite into orbit. Such joint action is to be distinguished from action by international organizations.[38]

(5) In order to contribute to the formation and identification of rules of customary international law, practice must be known to other States (whether or not it is publicly available).[39] Indeed, it is difficult to see how confidential conduct by a State could serve such a purpose unless and until it is known to other States.

Conclusion 6
Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

3. There is no predetermined hierarchy among the various forms of practice.

Commentary

(1) Draft conclusion 6 indicates the types of conduct that are covered under the term "practice", providing examples thereof and stating that no form of practice has *a priori* primacy over another in the identification of customary international law. It refers to forms of practice as empirically verifiable facts and avoids, for present purposes, a distinction between an act and its evidence.

(2) Given that States exercise their powers in various ways and do not confine themselves only to some types of acts, paragraph 1 provides that practice may take a wide range of forms. While some have argued that it is only what States "do" rather than what they "say" that may count as practice for purposes of identifying customary international law, it is now generally accepted that verbal conduct (whether written or oral) may count as practice; indeed, practice may at times consist entirely of verbal acts, for example, diplomatic protests.

(3) Paragraph 1 further makes clear that inaction may count as practice. The words "under certain circumstances" seek to caution, however, that only deliberate abstention from acting may serve such a role: the State in question needs to be conscious of refraining from acting in a given situation, and it cannot simply be assumed that abstention from acting is deliberate. Examples of such omissions (sometimes referred to as "negative practice") may include abstaining from instituting criminal proceedings against foreign State officials; refraining from exercising protection in favour of certain naturalized persons; and abstaining from the use of force.[40]

(4) Paragraph 2 provides a list of forms of practice that are often found to be useful for the identification of customary international law. As the words "but are not limited to" emphasize, this is a non-exhaustive list: given the inevitability and pace of change, both

[38] See also draft conclusion 4, paragraph 2, above, and the commentary thereto.

[39] Or, in the case of particular customary international law, to at least one other State or a group of States (see draft conclusion 16, below).

[40] For illustrations, see *The Case of the S.S. "Lotus"* (footnote 25 above), at p. 28; *Nottebohm Case (second phase), Judgment of 6 April, 1955, I.C.J. Reports 1955*, p. 4, at p. 22; and *Jurisdictional Immunities of the State* (see footnote 10 above), at pp. 134–135, para. 77.

political and technological, it would be impractical to draw up an exhaustive list of all the forms that practice might take.[41] The forms of practice listed are no more than examples, which, moreover, may overlap (for example, "diplomatic acts and correspondence" and "executive conduct").

(5) The order in which the forms of practice are listed in paragraph 2 is not intended to be significant. Each of the forms listed is to be interpreted broadly to reflect the multiple and diverse ways in which States act and react. The expression "executive conduct", for example, refers comprehensively to any form of executive act, including executive orders, decrees and other measures; official statements on the international plane or before a legislature; and claims before national or international courts and tribunals. The expression "legislative and administrative acts" similarly embraces the various forms of regulatory disposition effected by a public authority. The term "operational conduct 'on the ground'" includes law enforcement and seizure of property as well as battlefield or other military activity, such as the movement of troops or vessels, or deployment of certain weapons. The words "conduct in connection with treaties" cover acts related to the negotiation and conclusion of treaties, as well as their implementation; by concluding a treaty a State may be engaging in practice in the domain to which the treaty relates, such as maritime delimitation agreements or host country agreements. The reference to "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference" likewise includes acts by States related to the negotiation, adoption and implementation of resolutions, decisions and other acts adopted within international organizations or at intergovernmental conferences, whatever their designation and whether or not they are legally binding. Whether any of these examples of forms of practice are in fact relevant in a particular case will depend on the specific rule under consideration and all the relevant circumstances.[42]

(6) Decisions of national courts at all levels may count as State practice[43] (though it is likely that greater weight will be given to the higher courts); decisions that have been overruled on the particular point are unlikely to be considered relevant. The role of decisions of national courts as a form of State practice is to be distinguished from their potential role as a "subsidiary means" for the determination of rules of customary international law.[44]

(7) Paragraph 2 applies *mutatis mutandis* to the forms of practice of international organizations in those cases where, in accordance with draft conclusion 4, paragraph 2, above, such practice contributes to the formation, or expression, of rules of customary international law.

(8) Paragraph 3 clarifies that no form of practice has a higher probative value than others in the abstract. In particular cases, however, as explained in the commentaries to draft conclusions 3 and 7 above, it may be that different forms (or instances) of practice ought to be given different weight when they are assessed in context.

---

[41] See also "Ways and means for making the evidence of customary international law more readily available", *Yearbook ... 1950*, vol. II (Part Two), p. 368, para. 31; and document A/CN.4/710: Ways and means for making the evidence of customary international law more readily available: Memorandum by the Secretariat (2018).

[42] See paragraph (3) of the commentary to draft conclusion 3, above.

[43] See, for example, *Jurisdictional Immunities of the State* (footnote 10 above), at pp. 131–135, paras. 72–77; and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium). Judgment, I.C.J. Reports 2002*, p. 3, at p. 24, para. 58. The term "national courts" may also include courts with an international element operating within one or more domestic legal systems, such as courts or tribunals with mixed national and international composition.

[44] See draft conclusion 13, paragraph 2, below. Decisions of national courts may also serve as evidence of acceptance as law (*opinio juris*), on which see draft conclusion 10, paragraph 2, below.

Conclusion 7
Assessing a State's practice

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.

2. Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced.

Commentary

(1) Draft conclusion 7 concerns the assessment of the practice of a particular State in order to determine the position of that State as part of assessing the existence of a general practice (which is the subject of draft conclusion 8, below). As the two paragraphs of draft conclusion 7 make clear, it is necessary to take account of and assess as a whole all available practice of the State concerned on the matter in question, including its consistency.

(2) Paragraph 1 states, first, that in seeking to determine the position of a particular State on the matter in question, account is to be taken of all available practice of that State. This means that the practice examined should be exhaustive (having regard to its availability) and include the relevant practice of all of the State's organs and all relevant practice of a particular organ. The paragraph also makes it clear that relevant practice is to be assessed not in isolation but as a whole; only then can the actual position of the State be determined.

(3) The need to assess available practice "as a whole" is illustrated by the *Jurisdictional Immunities of the State* case, in which the International Court of Justice took note of the fact that although the Hellenic Supreme Court had decided in one case that, by virtue of the "territorial tort principle", State immunity under customary international law did not extend to the acts of armed forces during an armed conflict, a different position was adopted by the Greek Special Supreme Court; by the Government of Greece when refusing to enforce the Hellenic Supreme Court's judgment, and in defending this position before the European Court of Human Rights; and by the Hellenic Supreme Court itself in a later decision. Assessing such practice "as a whole" led the Court to conclude "that Greek State practice taken as a whole actually contradicts, rather than supports, Italy's argument" that State immunity under customary international law does not extend to the acts of armed forces during an armed conflict.[45]

(4) Paragraph 2 refers explicitly to situations where there is or appears to be inconsistent practice of a particular State. As just indicated, this may be the case where different organs or branches within the State adopt different courses of conduct on the same matter or where the practice of one organ varies over time. If in such circumstances a State's practice as a whole is found to be inconsistent, that State's contribution to the "general practice" element may be reduced.

(5) The words "may, depending on the circumstances" in paragraph 2 indicate that such assessment needs to be approached with caution, and the same conclusion would not necessarily be drawn in all cases. In the *Fisheries case*, for example, the International Court of Justice held that "too much importance need not be attached to the few uncertainties or contradictions, real or apparent … in Norwegian practice. They may be easily understood in the light of the variety of facts and conditions prevailing in the long period."[46] In this vein, for example, a difference in the practice of lower and higher organs of the same State is unlikely to result in less weight being given to the practice of the higher organ. Practice of organs of a central government will usually be more significant than that of constituent units of a federal State or political subdivisions of the State. The practice of the executive branch is often the most relevant on the international plane and thus has particular weight in

[45] *Jurisdictional Immunities of the State* (see footnote 10 above), at p. 134, para. 76, and p. 136, para. 83. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 1 above), at p. 98, para. 186.

[46] *Fisheries case, Judgment of 18 December 1951, I.C.J. Reports 1951*, p. 116, at p. 138.

connection with the identification of customary international law, though account may need to be taken of the constitutional position of the various organs in question.[47]

Conclusion 8
The practice must be general

1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.

2. Provided that the practice is general, no particular duration is required.

Commentary

(1) Draft conclusion 8 concerns the requirement that the practice must be general; it seeks to capture the essence of this requirement and the inquiry that is needed in order to verify whether it has been met in a particular case.

(2) Paragraph 1 explains that the notion of generality, which refers to the aggregate of the instances in which the alleged rule of customary international law has been followed, embodies two requirements. First, the practice must be followed by a sufficiently large and representative number of States. Second, such instances must exhibit consistency. In the words of the International Court of Justice in the *North Sea Continental Shelf* cases, the practice in question must be "both extensive and virtually uniform":[48] it must be a "settled practice".[49] As is explained below, no absolute standard can be given for either requirement; the threshold that needs to be attained for each has to be assessed taking account of context.[50] In each case, however, the practice should be of such a character as to make it possible to discern a virtually uniform usage. Contradictory or inconsistent practice is to be taken into account in evaluating whether such a conclusion may be reached.[51]

(3) The requirement that the practice be "widespread and representative" does not lend itself to exact formulations, as circumstances may vary greatly from one case to another (for example, the frequency with which circumstances calling for action arise).[52] As regards diplomatic relations, for example, in which all States regularly engage, a practice may have to be widely exhibited, while with respect to international canals, of which there are very few, the amount of practice would necessarily be less. This is captured by the word "sufficiently", which implies that the necessary number and distribution of States taking part in the relevant practice (like the number of instances of practice) cannot be identified in the abstract. It is clear, however, that universal participation is not required: it is not necessary to show that all States have participated in the practice in question. The participating States should include those that had an opportunity or possibility of applying the alleged rule.[53] It is important that such States are representative, which needs to be

---

[47] See, for example, *Jurisdictional Immunities of the State* (footnote 10 above), at p. 136, para. 83 (where the Court noted that "under Greek law" the view expressed by the Special Supreme Court prevailed over that of the Hellenic Supreme Court).

[48] *North Sea Continental Shelf* (see footnote 1 above), at p. 43, para. 74. A wide range of terms has been used to describe the requirement of generality, including by the International Court of Justice, without any real difference in meaning being implied.

[49] *Ibid.*, at p. 44, para. 77.

[50] See also draft conclusion 3, above.

[51] Divergences from the alleged rule may suggest that no rule exists or point, *inter alia*, to an admissible customary exception that has arisen; a change in a previous rule; a rule of particular customary international law; or the existence of one or more persistent objectors. It might also be relevant to consider the timing of the inconsistent practice, in particular whether it lay in the past, after which consistency prevailed.

[52] See also the judgment of 4 February 2016 of the Federal Court of Australia in *Ure v. The Commonwealth of Australia* [2016] FCAFC 8, para. 37 ("we would hesitate to say that it is impossible to demonstrate the existence of a rule of customary international [law] from a small number of instances of State practice. We would accept the less prescriptive proposition that as the number of instances of State practice decreases the task becomes more difficult").

[53] A relatively small number of States engaging in a certain practice might thus suffice if indeed such practice, as well as other States' inaction in response, is generally accepted as law (accompanied by *opinio juris*).

assessed in light of all the circumstances, including the various interests at stake and/or the various geographical regions.

(4) Thus, in assessing generality, an indispensable factor to be taken into account is the extent to which those States that are particularly involved in the relevant activity or most likely to be concerned with the alleged rule ("specially affected States") have participated in the practice.[54] While in many cases all or virtually all States will be equally affected, it would clearly be impractical to determine, for example, the existence and content of a rule of customary international law relating to navigation in maritime zones without taking into account the practice of coastal States and major shipping States, or the existence and content of a rule on foreign investment without evaluating the practice of the capital-exporting States as well as that of the States in which investment is made.

(5) The requirement that the practice be consistent means that where the relevant acts are divergent to the extent that no pattern of behaviour can be discerned, no general practice (and thus no corresponding rule of customary international law) can be said to exist. For example, in the *Fisheries case*, the International Court of Justice found that "although the ten-mile rule has been adopted by certain States ... other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law".[55]

(6) In examining whether the practice is consistent it is of course important to consider instances of conduct that are in fact comparable, that is, where the same or similar issues have arisen so that such instances could indeed constitute reliable guides. The Permanent Court of International Justice referred in the *Lotus* case to "precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle [of customary international law] applicable to the particular case may appear".[56]

(7) At the same time, complete consistency in the practice of States is not required. The relevant practice needs to be virtually or substantially uniform, meaning that some inconsistencies and contradictions are not necessarily fatal to a finding of "a general practice". In *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice held that:

> [i]t is not to be expected that in the practice of States the application of the rules in question should have been perfect ... The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely

---

[54] The International Court of Justice has said that "an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform", *North Sea Continental Shelf* (see footnote 9 above), at p. 43, para. 74. The term "specially affected States" should not be taken to refer to the relative power of States.

[55] *Fisheries case* (see footnote 46 above), at p. 131. A chamber of the International Court of Justice held in the *Gulf of Maine* case that where the practice demonstrates "that each specific case is, in the final analysis, different from all the others .... This precludes the possibility of those conditions arising which are necessary for the formation of principles and rules of customary law" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area* (see footnote 5 above), at p. 290, para. 81). See also, for example, *Colombian-Peruvian asylum case* (footnote 12 above), at p. 277 ("The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum ... that it is not possible to discern in all this any constant and uniform usage ... with regard to the alleged rule of unilateral and definitive qualification of the offence"); and *Interpretation of the air transport services agreement between the United States of America and Italy*, Advisory Opinion of 17 July 1965, United Nations, *Reports of International Arbitral Awards*, vol. XVI (Sales No. E/F.69.V.1), pp. 75—108, at p. 100 ("It is correct that only a constant practice, observed in fact and without change can constitute a rule of customary international law").

[56] *The Case of the S.S. "Lotus"* (see footnote 25 above), at p. 21. See also *North Sea Continental Shelf* (footnote 9 above), at p. 45, para. 79; and *Prosecutor v. Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14-A, Judgment (Appeals Chamber) of 28 May 2008*, Special Court for Sierra Leone, para. 406.

> rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules ... .[57]

(8) When inconsistency takes the form of breaches of a rule, this, too, does not necessarily prevent a general practice from being established. This is particularly so when the State concerned denies the violation and/or expresses support for the rule. As the International Court of Justice has observed:

> instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[58]

(9) Paragraph 2 refers to the time element, making clear that a relatively short period in which a general practice is followed is not, in and of itself, an obstacle to determining that a corresponding rule of customary international law exists. While a long duration may result in more extensive practice, time immemorial or a considerable or fixed duration of a general practice is not a condition for the existence of a customary rule.[59] The International Court of Justice confirmed this in the *North Sea Continental Shelf* cases, holding that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law".[60] As this passage makes clear, however, some period of time must elapse for a general practice to emerge; there is no such thing as "instant custom".

Part Four
Accepted as law (*opinio juris*)

Establishing that a certain practice is followed consistently by a sufficiently widespread and representative number of States does not in itself suffice in order to identify a rule of customary international law. Part Four concerns the second constituent element of customary international law, sometimes referred to as the "subjective" or "psychological" element, which requires that in each case, it is also necessary to be satisfied that there exists among States an acceptance as law (*opinio juris*) as to the binding character of the practice in question.

Conclusion 9
Requirement of acceptance as law (*opinio juris*)

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

Commentary

(1) Draft conclusion 9 seeks to encapsulate the nature and function of the second constituent element of customary international law, acceptance as law (*opinio juris*).

(2) Paragraph 1 explains that acceptance as law (*opinio juris*), as a constituent element of customary international law, refers to the requirement that the relevant practice must be undertaken with a sense of legal right or obligation, that is, it must be accompanied by a

---

[57] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 1 above), at p. 98, para. 186.

[58] *Ibid.* See also, for example, *Prosecutor v. Sam Hinga Norman* (footnote 13 above), para. 51. The same is true when assessing a particular State's practice: see draft conclusion 7, above.

[59] In fields such as international space law or the law of the sea, for example, customary international law has sometimes developed rapidly.

[60] *North Sea Continental Shelf* (see footnote 9 above), at p. 43, para. 74.

conviction that it is permitted, required or prohibited by customary international law.[61] It is thus crucial to establish, in each case, that States have acted in a certain way because they felt or believed themselves legally compelled or entitled to do so by reason of a rule of customary international law: they must have pursued the practice as a matter of right, or submitted to it as a matter of obligation. As the International Court of Justice stressed in the *North Sea Continental Shelf* judgment:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[62]

(3) Acceptance as law (*opinio juris*) is to be distinguished from other, extralegal motives for action, such as comity, political expediency or convenience: if the practice in question is motivated solely by such other considerations, no rule of customary international law is to be identified. Thus in the *Colombian-Peruvian asylum* case the International Court of Justice declined to recognize the existence of a rule of customary international law where the alleged instances of practice were not shown to be, *inter alia*:

> exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. ... considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation.[63]

(4) Seeking to comply with a treaty obligation as a treaty obligation, much like seeking to comply with domestic law, is not acceptance as law for the purpose of identifying customary international law: practice undertaken with such intention does not, by itself, lead to an inference as to the existence of a rule of customary international law.[64] A State may well recognize that it is bound by a certain obligation by force of both customary international law and treaty, but this would need to be proved. On the other hand, when States act in conformity with a treaty provision by which they are not bound, or apply conventional provisions in their relations with non-parties to the treaty, this may evidence the existence of acceptance as law (*opinio juris*) in the absence of any explanation to the contrary.

---

[61] While acceptance of a certain practice as law (*opinio juris*) has often been described in terms of "a sense of legal obligation", draft conclusion 9 uses the broader language "a sense of legal right or obligation" as States have both rights and obligations under customary international law and they may act in the belief that they have a right or an obligation. The draft conclusion does not suggest that, where there is no prohibition, a State needs to point to a right to justify its action.

[62] *North Sea Continental Shelf* (see footnote 9 above), at p. 44, para. 77; see also paragraph 76 (referring to the requirement that States "believed themselves to be applying a mandatory rule of customary international law"). The Court has also referred, *inter alia*, to "a practice illustrative of belief in a kind of general right for States" (*Military and Paramilitary Activities in and against Nicaragua* (see footnote 1 above), at p. 108, para. 206).

[63] *Colombian-Peruvian asylum case* (see footnote 12 above), at pp. 277 and 286. See also *The Case of the S.S. "Lotus"* (footnote 25 above), at p. 28 ("Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged ... it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand ... there are other circumstances calculated to show that the contrary is true"); and *Military and Paramilitary Activities in and against Nicaragua* (see footnote 1 above), at pp. 108–110, paras. 206–209.

[64] See, for example, *North Sea Continental Shelf* (footnote 9 above), at p. 43, para. 76. A particular difficulty may thus arise in ascertaining whether a rule of customary international law has emerged where a non-declaratory treaty has attracted virtually universal participation.

(5) Acceptance as law (*opinio juris*) is to be sought with respect to both the States engaging in the relevant practice and those in a position to react to it, who must be shown to have understood the practice as being in accordance with customary international law.[65] It is not necessary to establish that all States have recognized (accepted as law) the alleged rule as a rule of customary international law; it is broad and representative acceptance, together with no or little objection, that is required.[66]

(6) Paragraph 2 emphasizes that, without acceptance as law (*opinio juris*), a general practice may not be considered as creative, or expressive, of customary international law; it is mere usage or habit. In other words, practice that States consider themselves legally free either to follow or to disregard does not contribute to or reflect customary international law (unless the rule to be identified itself provides for such a choice).[67] Not all observed regularities of international conduct bear legal significance: diplomatic courtesies, for example, such as the provision of red carpets for visiting heads of State, are not accompanied by any sense of legal obligation and thus could not generate or attest to any legal duty or right to act accordingly.[68]

Conclusion 10
Forms of evidence of acceptance as law (*opinio juris*)

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.

2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

Commentary

(1) Draft conclusion 10 concerns the evidence from which acceptance of a given practice as law (*opinio juris*) may be ascertained. It reflects the fact that acceptance as law may be made known through various manifestations of State behaviour, which should be

---

[65] See *Military and Paramilitary Activities in and against Nicaragua* (footnote 1 above), at p. 109, para. 207 ("Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'" (citing the *North Sea Continental Shelf* judgment)).

[66] Thus, where "the members of the international community are profoundly divided" on the question of whether a certain practice is accompanied by acceptance as law (*opinio juris*), no such acceptance as law could be said to exist: see *Legality of the Threat or Use of Nuclear Weapons* (footnote 13 above), at p. 254, para. 67.

[67] In the *Right of Passage* case the International Court of Justice thus observed, with respect to the passage of armed forces and armed police, that "[t]he practice predicates that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It is argued that permission was always granted, but this does not, in the opinion of the Court, affect the legal position. There is nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation" (*Case concerning Right of Passage over Indian Territory* (see footnote 13 above), at pp. 42–43). In the *Jurisdictional Immunities of the State* case, the International Court of Justice similarly held, in seeking to determine the content of a rule of customary international law, that, "[w]hile it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court" (*Jurisdictional Immunities of the State* (see footnote 10 above), at p. 123, para. 55).

[68] The International Court of Justice observed that indeed "[t]here are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty" (*North Sea Continental Shelf* (see footnote 9 above), at p. 44, para. 77).

carefully assessed to determine whether, in any given case, they actually reflect a State's views on the current state of customary international law.

(2) Paragraph 1 sets forth the general proposition that acceptance as law (*opinio juris*) may be reflected in a wide variety of forms. States may express their recognition (or rejection) of the existence of a rule of customary international law in many ways. Such conduct indicative of acceptance as law supporting an alleged rule encompasses, as the subsequent paragraphs make clear, both statements and physical actions (as well as inaction) concerning the practice in question.

(3) Paragraph 2 provides a non-exhaustive list of forms of evidence of acceptance as law (*opinio juris*), including those most commonly resorted to for such purpose.[69] Such forms of evidence may also indicate lack of acceptance as law. There is some common ground between the forms of evidence of acceptance as law and the forms of State practice referred to in draft conclusion 6, paragraph 2 above;[70] in part, this reflects the fact that the two elements may at times be found in the same material (but, even then, their identification requires a separate exercise in each case[71]). In any event, statements are more likely to embody the legal conviction of the State, and may often be more usefully regarded as expressions of acceptance as law (or otherwise) rather than instances of practice.

(4) Among the forms of evidence of acceptance as law (*opinio juris*), an express public statement on behalf of a State that a given practice is permitted, prohibited or mandated under customary international law provides the clearest indication that the State has avoided or undertaken such practice (or recognized that it was rightfully undertaken or avoided by others) out of a sense of legal right or obligation. Similarly, the effect of practice in line with the supposed rule may be nullified by contemporaneous statements that no such rule exists.[72] Either way, such statements could be made, for example, in debates in multilateral settings; when introducing draft legislation before the legislature; as assertions made in written and oral pleadings before courts and tribunals; in protests characterizing the conduct of other States as unlawful; and in response to proposals for codification. They may be made individually or jointly with others.

(5) The other forms of evidence listed in paragraph 2 may also be of particular assistance in ascertaining the legal position of States in relation to certain practices. Among these, the term "official publications" covers documents published in the name of a State, such as military manuals and official maps, in which acceptance as law (*opinio juris*) may be found. Published opinions of government legal advisers may likewise shed light on a State's legal position, though not if the State declined to follow the advice. Diplomatic correspondence may include, for example, circular notes to diplomatic missions, such as those on privileges and immunities. National legislation, while it is most often the product of political choices, may be valuable as evidence of acceptance as law, particularly where it has been specified (for example, in connection with the passage of the legislation) that it is mandated under or gives effect to customary international law. Decisions of national courts may also contain such statements when pronouncing upon questions of international law.

(6) Multilateral drafting and diplomatic processes may afford valuable and accessible evidence as to the legal convictions of States with respect to the content of customary international law, hence the reference to "treaty provisions" and to "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference". Their potential utility in the identification of rules of customary international law is examined in greater detail in draft conclusions 11 and 12, below.

(7) Paragraph 2 applies *mutatis mutandis* to the forms of evidence of acceptance of law (*opinio juris*) of international organizations.

---

[69] See also document A/CN.4/710: Ways and means for making the evidence of customary international law more readily available: Memorandum by the Secretariat (2018).

[70] There are also differences between the lists, as they are intended to refer to the principal examples connected with each of the constituent elements.

[71] See draft conclusion 3, paragraph 2, above.

[72] At times the practice itself is accompanied by an express disavowal of legal obligation, such as when States pay compensation *ex gratia* for damage caused to foreign diplomatic property.

(8) Paragraph 3 provides that, under certain conditions, failure by States to react, within a reasonable time, may also, in the words of the International Court of Justice in the *Fisheries case*, "[bear] witness to the fact that they did not consider ... [a certain practice undertaken by others] to be contrary to international law".[73] Tolerance of a certain practice may indeed serve as evidence of acceptance as law (*opinio juris*) when it represents concurrence in that practice. For such a lack of open objection or protest to have this probative value, however, two requirements must be satisfied in the circumstances of each case in order to ensure that such inaction does not derive from causes unrelated to the legality of the practice in question.[74] First, it is essential that a reaction to the practice in question would have been called for:[75] this may be the case, for example, where the practice is one that affects — usually unfavourably — the interests or rights of the State failing or refusing to act.[76] Second, the reference to a State being "in a position to react" means that the State concerned must have had knowledge of the practice (which includes circumstances where, because of the publicity given to the practice, it must be assumed that the State had such knowledge), and that it must have had sufficient time and ability to act. Where a State did not or could not have been expected to know of a certain practice, or has not yet had a reasonable time to respond, inaction cannot be attributed to an acknowledgment that such practice was mandated (or permitted) under customary international law. A State may also provide other explanations for its perceived silence.

Part Five
Significance of certain materials for the identification of customary international law

Commentary

(1) Various materials other than primary evidence of alleged instances of practice accepted as law (accompanied by *opinio juris*) may be consulted in the process of determining the existence and content of rules of customary international law. These commonly include written texts bearing on legal matters, in particular treaties, resolutions of international organizations and intergovernmental conferences, judicial decisions (of both international and national courts), and scholarly works. Such texts may assist in collecting, synthesizing or interpreting practice relevant to the identification of customary international law, and may offer precise formulations to frame and guide an inquiry into its two constituent elements. Part Five seeks to explain the potential significance of these

---

[73] *Fisheries case* (see footnote 46 above), at p. 139. See also *The Case of the S.S. "Lotus"* (footnote 25 above), at p. 29 ("the Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests: their conduct does not appear to have differed appreciably from that observed by them in all cases of concurrent jurisdiction. This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown, such as the Agent for the French Government has thought it possible to deduce from the infrequency of questions of jurisdiction before criminal courts. It seems hardly probable, and it would not be in accordance with international practice, that the French Government in the *Ortigia-Oncle-Joseph* case and the German Government in the *Ekbatana-West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law"); and *Priebke, Erich s/ solicitud de extradición, Case No. 16.063/94, Judgment of 2 November 1995*, Supreme Court of Justice of Argentina, Vote of Judge Gustavo A. Bossert, at p. 40, para. 90.

[74] See also, more generally, *North Sea Continental Shelf* (footnote 9 above), at p. 27, para. 33.

[75] The International Court of Justice has observed, in a different context, that "[t]he absence of reaction may well amount to acquiescence .... That is to say, silence may also speak, but only if the conduct of the other State calls for a response" (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 12, at pp. 50–51, para. 121). See also *Dispute regarding Navigational and Related Rights* (footnote 21 above), at pp. 265–266, para. 141 ("For the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant").

[76] It may well be that a certain practice would be seen as affecting all or virtually all States.

materials, making clear that it is of critical importance to study carefully both the content of such materials and the context within which they were prepared.

(2) The output of the International Law Commission itself merits special consideration in the present context. As has been recognized by the International Court of Justice and other courts and tribunals,[77] a determination by the Commission affirming the existence and content of a rule of customary international law may have particular value, as may a conclusion by it that no such rule exists. This flows from the Commission's unique mandate, as a subsidiary organ of the United Nations General Assembly, to promote the progressive development of international law and its codification;[78] the thoroughness of its procedures (including the consideration of extensive surveys of State practice and *opinio juris*); and its close relationship with the General Assembly and States (including receiving oral and written comments from States as it proceeds with its work). The weight to be given to the Commission's determinations depends, however, on various factors, including the sources relied upon by the Commission, the stage reached in its work, the extent to which the Commission is engaged in progressive development of the law, and above all upon States' reception of its output.[79]

Conclusion 11
Treaties

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(*a*) codified a rule of customary international law existing at the time when the treaty was concluded;

(*b*) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(*c*) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

Commentary

(1) Draft conclusion 11 concerns the significance of treaties for the identification of customary international law. The draft conclusion does not address conduct in connection with treaties as a form of practice, a matter covered in draft conclusion 6 above, nor does it directly concern the treaty-making process or draft treaty provisions, which may themselves give rise to State practice and evidence of acceptance as law (*opinio juris*) as indicated in draft conclusions 6 and 10 above.

(2) While treaties are, as such, binding only on the parties thereto, they "may have an important role to play in recording and defining rules deriving from custom, or indeed in

[77] See, for example, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 40, para. 51; *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 56, para. 169; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgment (Appeals Chamber) of 13 December 2004*, International Criminal Tribunal for Rwanda, para. 518; *Dubai-Sharjah Border Arbitration* (1981), *International Law Reports*, vol. 91, pp. 543–701, at p. 575; and 2 BvR 1506/03, German Federal Constitutional Court, Order of the Second Senate of 5 November 2003, para. 47.

[78] See the statute of the International Law Commission (1947), adopted by the General Assembly in resolution 174 (II) of 21 November 1947.

[79] Once the General Assembly has taken action in relation to a final draft of the Commission, such as by annexing it to a resolution and commending it to States, the output of the Commission may also fall to be considered under draft conclusion 12, below.

developing them".[80] Their provisions (and the processes of their adoption and application) may shed light on the content of customary international law.[81] Clearly expressed treaty provisions may offer particularly convenient evidence as to the existence or content of rules of customary international law when they are found to be declaratory of such rules. Yet the words "may reflect" caution that, in and of themselves, treaties cannot create a rule of customary international law or conclusively attest to its existence or content.

(3) The number of parties to a treaty may be an important factor in determining whether particular rules set forth therein correspond to customary international law; treaties that have obtained near-universal acceptance may be seen as particularly indicative in this respect.[82] But treaties that are not yet in force or which have not yet attained widespread participation may also be influential in certain circumstances, particularly where they were adopted without opposition or by an overwhelming majority of States.[83] In any case, the attitude of States not party to a widely ratified treaty, both at the time of its conclusion and subsequently, may also be of relevance.

(4) Paragraph 1 sets out three circumstances in which rules set forth in a treaty may be found to reflect customary international law, distinguished by the time when the rule of customary international law was (or began to be) formed. The use of the term "rule set forth in a treaty" seeks to indicate that a rule may not necessarily be contained in a single treaty provision, but could be reflected by two or more provisions read together.[84] The words "if it is established that" make it clear that establishing whether a conventional rule does in fact correspond to an alleged rule of customary international law cannot be done just by looking at the text of the treaty: in each case the existence of the rule must be confirmed by practice (together with acceptance as law). It is important that States can be shown to engage in the practice not (solely) because of the treaty obligation, but out of a conviction that the rule embodied in the treaty is or has become a rule of customary international law.[85]

---

[80] *Continental Shelf* (see footnote 10 above), at pp. 29–30, para. 27 ("It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them"). Article 38 of the 1969 Vienna Convention refers to the possibility of "a rule set forth in a treaty … becoming binding upon a third State as a customary rule of international law, recognized as such".

[81] See *Jurisdictional Immunities of the State* (footnote 10 above), at p. 128, para. 66; "Ways and means for making the evidence of customary international law more readily available", *Yearbook … 1950*, vol. II (Part Two), p. 368, para. 29 ("not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law").

[82] See, for example, Eritrea-Ethiopia Claims Commission, *Partial Award: Prisoners of War, Ethiopia's Claim 4*, 1 July 2003, United Nations, *Reports of International Arbitral Awards*, vol. XXVI (Sales No. E/F.06.V.7), pp. 73–114, at pp. 86–87, para. 31 ("Certainly, there are important, modern authorities for the proposition that the Geneva Conventions of 1949 have largely become expressions of customary international law, and both Parties to this case agree. The mere fact that they have obtained nearly universal acceptance supports this conclusion" (footnote omitted)); and *Prosecutor v. Sam Hinga Norman* (see footnote 13 above) at paras. 17–20 (referring, *inter alia*, to the "huge acceptance, the highest acceptance of all international conventions" as indicating that the relevant provisions of the Convention on the Rights of the Child had come to reflect customary international law).

[83] See, for example, *Continental Shelf* (footnote 10 above), at p. 30, para. 27 ("it cannot be denied that the 1982 Convention [on the Law of the Sea — which was not then in force] is of major importance, having been adopted by an overwhelming majority of States; hence it is clearly the duty of the Court, even independently of the references made to the Convention by the Parties, to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law").

[84] It may also be the case that a single provision only partly reflects customary international law.

[85] In the *North Sea Continental Shelf* cases, this consideration led to the disqualification of several of the invoked instances of State practice (*North Sea Continental Shelf* (see footnote 9 above), at p. 43, para. 76).

(5) Subparagraph (*a*) concerns the situation where it is established that a rule set forth in a treaty is declaratory of a pre-existing rule of customary international law.[86] In inquiring whether this is the case with respect to an alleged rule of customary international law, regard should first be had to the treaty text, which may contain an express statement on the matter.[87] The fact that reservations are expressly permitted to a treaty provision may suggest that the treaty provision does not reflect customary international law, but is not necessarily conclusive.[88] Such indications within the text, however, may be lacking, or may refer to the treaty in general rather than to any specific rule contained therein;[89] in such case, resort may be had to the treaty's preparatory work,[90] including any statements by States in the course of the drafting process that may disclose an intention to codify an existing rule of customary international law. If it is found that the negotiating States had indeed considered that the rule in question was a rule of customary international law, this would be evidence of acceptance as law (*opinio juris*), which would carry greater weight in the identification of the customary rule the larger the number of negotiating States. There

---

[86] See, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 1 above), at pp. 46–47, para. 87.

[87] In the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (United Nations, *Treaties Series*, vol. 78, No. 1021, p. 277), for example, the Parties "*confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law" (art. 1) (emphasis added); and the 1958 Geneva Convention on the High Seas contains the following preambular paragraph: "*Desiring* to codify the rules of international law relating to the high seas" (*ibid.*, vol. 450, No. 6465, at p. 82). A treaty may equally indicate that it embodies progressive development rather than codification; in the *Colombian-Peruvian asylum case*, for example, the International Court of Justice found that the preamble to the Montevideo Convention on Rights and duties of States of 1933 (League of Nations, *Treaty Series*, vol. CLXV, No. 3802, p. 19), which states that it modifies a previous convention (and the limited number of States that have ratified it), runs counter to the argument that the Convention "merely codified principles which were already recognized by … custom" (*Colombian-Peruvian asylum case* (see footnote 12 above), at p. 277).

[88] See also the Commission's Guide to Practice on Reservations to Treaties, guidelines 3.1.5.3 (Reservations to a provision reflecting a customary rule) and 4.4.2 (Absence of effect on rights and obligations under customary international law), *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10 and Add.1).

[89] The 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws (League of Nations, *Treaty Series*, vol. CLXXIX, No. 4137, p. 89), for example, provides that: "The inclusion of the above-mentioned principles and rules in the Convention shall in no way be deemed to prejudice the question whether they do or do not already form part of international law" (art. 18). Sometimes a general reference is made to both codification and development: in the 1969 Vienna Convention, for example, the States parties express in the preamble their belief that "codification and progressive development of the law of treaties [are] achieved in the present Convention"; in the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (General Assembly resolution 59/38 of 2 December 2004), the States parties consider in the preamble "that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law" and express their belief that the Convention "would contribute to the codification and development of international law and the harmonization of practice in this area". See also *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs* and *Secretary of State for Foreign and Commonwealth Affairs* and *Libya v Janah*, United Kingdom Supreme Court, [2017] UKSC 62 (18 October 2017), para. 32.

[90] In examining in the *North Sea Continental Shelf* cases whether article 6 of the 1958 Convention on the Continental Shelf (United Nations, *Treaty Series*, vol. 499, No. 7302, p. 311) reflected customary international law when the Convention was drawn up, the International Court of Justice held that "[t]he status of the rule in the Convention therefore depends mainly on the processes that led the [International Law] Commission to propose it. These processes have already been reviewed in connection with the Danish-Netherlands contention of an *a priori* necessity for equidistance [in maritime delimitation], and the Court considers this review sufficient for present purposes also, in order to show that the principle of equidistance, as it now figures in Article 6 of the Convention, was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law. This is clearly not the sort of foundation on which Article 6 of the Convention could be said to have reflected or crystallized such a rule" (*North Sea Continental Shelf* (see footnote 9 above), at p. 38, para. 62). See also *Jurisdictional Immunities of the State* (footnote 10 above), at pp. 138–139, para. 89.

would, however, still remain a need to consider whether sufficiently widespread and representative, as well as consistent, instances of the relevant practice supported the existence of a rule of customary international law (as distinct from a treaty obligation). This is both because the fact that the parties assert that the treaty is declaratory of existing law is no more than one piece of evidence to that effect, and because the rule of customary international law underlying a treaty text may have changed or been superseded since the conclusion of the treaty. In other words, relevant practice will need to confirm, or exist in conjunction with, the *opinio juris*.

(6) Subparagraph (*b*) concerns the case where it is established that a general practice that is accepted as law (accompanied by *opinio juris*) has crystallized around a treaty rule elaborated on the basis of only a limited amount of State practice. In other words, the treaty rule has consolidated and given further definition to a rule of customary international law that was only emerging at the time when the treaty was being drawn up, thereby later becoming reflective of it.[91] Here, too, establishing that this is indeed the case requires an evaluation of whether the treaty formulation has been accepted as law and does in fact find support in a general practice.[92]

(7) Subparagraph (*c*) concerns the case where it is established that a rule set forth in a treaty has generated a new rule of customary international law.[93] This is a process that is not lightly to be regarded as having occurred. As the International Court of Justice explained in the *North Sea Continental Shelf* cases, for it to be established that a rule set forth in a treaty has produced the effect that a rule of customary international law has come into being:

> [i]t would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law. ... [A]n indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[94]

In other words, a general practice accepted as law (accompanied by *opinio juris*) "in the sense of the provision invoked" must be observed. Given that the concordant behaviour of parties to the treaty among themselves could presumably be attributed to the treaty

---

[91] Even where a treaty provision could not eventually be agreed, it remains possible that customary international law has later evolved "through the practice of States on the basis of the debates and near-agreements at the Conference [where a treaty was negotiated]": *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, at pp. 191–192, para. 44.

[92] See, for example, *Continental Shelf* (footnote 10 above), at p. 33, para. 34 ("It is in the Court's view incontestable that ... the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown *by the practice of States* to have become a part of customary law" (emphasis added)).

[93] As the International Court of Justice confirmed, "this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed" (*North Sea Continental Shelf* (see footnote 9 above), at p. 41, para. 71). One example frequently cited is the Hague Regulations annexed to the 1907 Fourth Hague Convention respecting the Laws and Customs of War on Land: although these were prepared, according to the Convention, "to revise the general laws and customs of war" existing at that time (and thus did not codify existing customary international law), they later came to be regarded as reflecting customary international law (see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 172, para. 89).

[94] *North Sea Continental Shelf* (see footnote 9 above), at pp. 41–43, paras. 72 and 74 (cautioning, at para. 71, that "this result is not lightly to be regarded as having been attained"). See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 1 above), at p. 98, para. 184 ("Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice").

obligation, rather than to acceptance of the rule in question as binding under customary international law, the practice of such parties in relation to non-parties to the treaty, and of non-parties in relation to parties or among themselves, will have particular value.

(8) Paragraph 2 seeks to caution that the existence of similar provisions in a number of bilateral or other treaties, thus establishing similar rights and obligations for a possibly broad array of States, does not necessarily indicate that a rule of customary international law is reflected in such provisions. While it may indeed be the case that such repetition attests to the existence of a corresponding rule of customary international law (or has given rise to it), it "could equally show the contrary" in the sense that States enter into treaties because of the absence of any rule or in order to derogate from it.[95] Again, an investigation into whether there are instances of practice accepted as law (accompanied by *opinio juris*) that support the written rule is required.

Conclusion 12
Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development.

3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

Commentary

(1) Draft conclusion 12 concerns the role that resolutions adopted by international organizations or at intergovernmental conferences may play in the determination of rules of customary international law. It provides that, while such resolutions, of themselves, can neither constitute rules of customary international law nor serve as conclusive evidence of their existence and content, they may sometimes have value in providing evidence of existing or emerging law.[96]

(2) As in draft conclusion 6, the word "resolution" refers to resolutions, decisions and other acts adopted by international organizations or at intergovernmental conferences, whatever their designation[97] and whether or not they are legally binding. Special attention should be paid in the present context to resolutions of the General Assembly, a plenary organ of the United Nations with virtually universal participation that may offer important evidence of the collective opinions of its members. Resolutions adopted by organs (or at conferences) with more limited membership may also be relevant, but their weight in identifying a rule of customary international law is likely to be less.

(3) Although resolutions of organs of international organizations (unlike resolutions of intergovermental conferences) emanate, strictly speaking, not from the States members but

---

[95] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 615, para. 90 ("The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary").

[96] See *Legality of the Threat or Use of Nuclear Weapons* (footnote 13 above), at pp. 254–255, para 70; *SEDCO Incorporated v. National Iranian Oil Company and Iran*, second interlocutory award, Award No. ITL 59-129-3 of 27 March 1986, *International Law Reports*, vol. 84, pp. 483–592, at p. 526.

[97] There is a wide range of designations, such as "declaration" or "declaration of principles".

from the organization, in the context of the present draft conclusion what is relevant is that they may reflect the collective expression of the views of such States: when they purport (explicitly or implicitly) to touch upon legal matters, the resolutions may afford an insight into the attitudes of the member States towards such matters. Much of what has been said of treaties in relation to draft conclusion 11, above, applies to resolutions; however, unlike treaties, resolutions are normally not legally binding documents, for the most part do not seek to embody legal rights and obligations, and generally receive less legal review than treaty texts. Like treaties, resolutions cannot be a substitute for the task of ascertaining whether there is in fact a general practice that is accepted as law (accompanied by *opinio juris*).

(4) Paragraph 1 makes clear that resolutions adopted by international organizations or at intergovernmental conferences cannot independently constitute rules of customary international law. In other words, the mere adoption of a resolution (or a series of resolutions) purporting to lay down a rule of customary international law does not create such law: it has to be established that the rule set forth in the resolution does in fact correspond to a general practice that is accepted as law (accompanied by *opinio juris*). There is no "instant custom" arising from such resolutions on their own account.[98]

(5) Paragraph 2 states, first, that resolutions may nevertheless assist in the determination of rules of customary international law by providing evidence of their existence and content. The word "may" seeks to caution that not all resolutions serve such a role. As the International Court of Justice has observed, resolutions "even if they are not binding … can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*".[99] This is particularly so when a resolution purports to be declaratory of an existing rule of customary international law, in which case it may serve as evidence of the acceptance as law of such a rule by those States supporting the resolution. In other words, "[t]he effect of consent to the text of such resolutions … may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution".[100] Conversely, negative votes, abstentions or disassociations from a consensus, along with general statements and explanations of positions, may be evidence that there is no acceptance as law.

(6) Because the attitude of States towards a given resolution (or a particular rule set forth in a resolution), expressed by vote or otherwise, is often motivated by political or other non-legal considerations, ascertaining acceptance as law (*opinio juris*) from such resolutions must be done "with all due caution".[101] This is denoted by the word "may". In each case, a careful assessment of various factors is required in order to verify whether indeed the States concerned intended to acknowledge the existence of a rule of customary international law. As the International Court of Justice indicated in *Legality of the Threat or Use of Nuclear Weapons*, "it is necessary to look at [the resolution's] content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule."[102] The precise wording used is the starting point in seeking to evaluate the legal significance of a resolution; reference to international law, and the choice (or avoidance) of particular terms in the text, including the preambular as well as the operative language, may be significant.[103] Also relevant are the

[98] See also para. (9) of the commentary to draft conclusion 8, above.

[99] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 13 above), at pp. 254–255, para. 70 (referring to General Assembly resolutions).

[100] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 1 above), at p. 100, para. 188. See also *The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL)*, Final Award of 24 March 1982, *International Law Reports*, vol. 66, pp. 518–627, at pp. 601–602, para. 143.

[101] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 1 above), at p. 99, para. 188.

[102] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 13 above), at p. 255, para. 70.

[103] In resolution 96 (I) of 11 December 1946, for example, the General Assembly "*Affirm[ed]* that genocide is a crime under international law", language that suggests that the paragraph was intended to be declaratory of existing customary international law.

debates and negotiations leading up to the adoption of the resolution and especially explanations of vote and similar statements given immediately before or after adoption.[104] The degree of support for the resolution (as may be observed in the size of the majority and where there are negative votes or abstentions) is critical. Differences of opinion expressed on aspects of a resolution may indicate that no general acceptance as law (*opinio juris*) exists, at least on those aspects, and resolutions which attract negative votes or abstentions are unlikely to be regarded as reflecting customary international law.[105]

(7) Paragraph 2 further acknowledges that resolutions adopted by international organizations or at intergovernmental conferences, even when devoid of legal force of their own, may sometimes play an important role in the development of customary international law. This may be the case when, as with a treaty, a resolution (or a series of resolutions) provides inspiration and impetus for the growth of a general practice accepted as law (accompanied by *opinio juris*) conforming to its terms, or when it crystallizes an emerging rule.

(8) Paragraph 3 makes it clear that provisions of resolutions adopted by an international organization or at an intergovernmental conference cannot in and of themselves serve as conclusive evidence of the existence and content of rules of customary international law. This follows from the indication that, for the existence of a rule to be demonstrated, the *opinio juris* of States, as may be evidenced by a resolution, must be borne out by practice; other evidence is thus required, in particular to show whether the alleged rule is in fact observed in the practice of States.[106] A provision of a resolution cannot be evidence of a rule of customary international law if actual practice is absent, different or inconsistent.

Conclusion 13
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

Commentary

(1) Draft conclusion 13 concerns the role of decisions of courts and tribunals, both international and national, as an aid in the identification of rules of customary international law. It should be recalled that decisions of national courts may serve a dual role in the identification of customary international law. On the one hand, as the above draft conclusions 6 and 10 indicate, they may serve as practice and/or evidence of acceptance as law (*opinio juris*) of the forum State. Draft conclusion 13, on the other hand, indicates that such decisions may also serve as a subsidiary means for the determination of rules of

[104] In the General Assembly, explanations of vote are often given upon adoption by a main committee, in which case they are not usually repeated in the plenary.

[105] See, for example, *Legality of the Threat or Use of Nuclear Weapons* (footnote 13 above), at p. 255, para. 71 ("several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons").

[106] See, for example, *KAING Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment*, Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber (3 February 2012), para. 194 ("The 1975 Declaration on Torture [resolution 3452 (XXX) of 9 December 1975, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] is a non-binding General Assembly resolution and thus more evidence is required to find that the definition of torture found therein reflected customary international law at the relevant time").

customary international law when they themselves examine the existence and content of such rules.

(2) Draft conclusion 13 follows closely the language of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, according to which, while decisions of the Court have no binding force except between the parties, judicial decisions are a subsidiary means (in French, *moyen auxiliaire*) for the determination of rules of international law, including rules of customary international law. The term "subsidiary means" denotes the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law (as are treaties, customary international law and general principles of law). The use of the term "subsidiary means" does not, and is not intended to, suggest that such decisions are not important in practice.

(3) Decisions of courts and tribunals on questions of international law, in particular those decisions in which the existence of rules of customary international law is considered and such rules are identified and applied, may offer valuable guidance for determining the existence or otherwise of rules of customary international law. The value of such decisions varies greatly, however, depending both on the quality of the reasoning (including primarily the extent to which it results from a thorough examination of evidence of an alleged general practice accepted as law) and on the reception of the decision, in particular by States and in future case law. Other considerations might, depending on the circumstances, include the composition of the court or tribunal (and the particular expertise of its members); the size of the majority by which the decision was adopted; and the conditions under which the court or tribunal conducts its work. It needs to be borne in mind, moreover, that judicial pronouncements on customary international law do not freeze the law; rules of customary international law may have evolved since the date of a particular decision.

(4) Paragraph 1 refers to "international courts and tribunals", a term intended to cover any international body exercising judicial powers that is called upon to consider rules of customary international law. Express mention is made of the International Court of Justice, the principal judicial organ of the United Nations whose Statute is an integral part of the Charter of the United Nations and whose members are elected by the General Assembly and Security Council, in recognition of the significance of its case law and its particular position as the only standing international court of general jurisdiction.[107] In addition to the predecessor of the International Court of Justice, the Permanent Court of International Justice, the term "international courts and tribunals" includes (but is not limited to) specialist and regional courts, such as the International Tribunal for the Law of the Sea, the International Criminal Court and other international criminal tribunals, regional human rights courts and the World Trade Organization Dispute Settlement Body. It also includes inter-State arbitral tribunals and other arbitral tribunals applying international law. The skills and the breadth of evidence usually at the disposal of international courts and tribunals may lend significant weight to their decisions, subject to the considerations mentioned in the preceding paragraph.

(5) For the purposes of this draft conclusion, the term "decisions" includes judgments and advisory opinions, as well as orders on procedural and interlocutory matters. Separate and dissenting opinions may shed light on the decision and may discuss points not covered in the decision of the court or tribunal, but they need to be approached with caution since they reflect the viewpoint of the individual judge and may set out points not accepted by the court or tribunal.

---

[107] Although there is no hierarchy of international courts and tribunals, decisions of the International Court of Justice are often regarded as authoritative by other courts and tribunals. See, for example, *Jones and Others v. the United Kingdom*, Application nos. 34356/06 and 40528/06, European Court of Human Rights, ECHR 2014, para. 198; *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, at paras. 133–134; and *Japan — Taxes on Alcoholic Beverages*, WTO Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted on 1 November 1996, sect. D.

(6) Paragraph 2 concerns decisions of national courts (also referred to as domestic or municipal courts).[108] The distinction between international and national courts is not always clear-cut; in these draft conclusions, the term "national courts" includes courts with an international composition operating within one or more domestic legal systems, such as "hybrid" courts and tribunals involving mixed national and international composition and jurisdiction.

(7) Some caution is called for when seeking to rely on decisions of national courts as a subsidiary means for the determination of rules of customary international law. This is reflected in the different wording of paragraphs 1 and 2, in particular the use of the words "[r]egard may be had, as appropriate" in paragraph 2. National courts operate within a particular legal system, which may incorporate international law only in a particular way and to a limited extent. Their decisions may reflect a particular national perspective. Unlike most international courts, national courts sometimes lack international law expertise and may have reached their decisions without the benefit of hearing argument advanced by States.[109]

Conclusion 14
Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

Commentary

(1) Draft conclusion 14 concerns the role of teachings (in French, *doctrine*) in the identification of rules of customary international law. Following closely the language of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, it provides that such works may be resorted to as a subsidiary means (*moyen auxiliaire*) for determining rules of customary international law, that is to say, when ascertaining whether there is a general practice that is accepted as law (accompanied by *opinio juris*). The term "teachings", often referred to as "writings", is to be understood in a broad sense; it includes teachings in non-written form, such as lectures and audiovisual materials.

(2) As with decisions of courts and tribunals, referred to above in draft conclusion 13, writings are not themselves a source of international law, but may offer guidance for the determination of the existence and content of rules of customary international law. This auxiliary role recognizes the value that teachings may have in collecting and assessing State practice; in identifying divergences in State practice and the possible absence or development of rules; and in evaluating the law.

(3) There is need for caution when drawing upon writings, since their value for determining the existence of a rule of customary international law varies: this is reflected in the words "may serve as". First, writers sometimes seek not merely to record the state of the law as it is (*lex lata*) but to advocate its development (*lex ferenda*). In doing so, they do not always distinguish (or distinguish clearly) between the law as it is and the law as they would like it to be. Second, writings may reflect the national or other individual viewpoints of their authors. Third, they differ greatly in quality. Assessing the authority of a given work is thus essential; the United States Supreme Court in the *Paquete Habana Case* referred to:

> the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the

[108] On decisions of national courts as a subsidiary means for the determination of rules of customary international law see, for example, *Mohammed and others v. Ministry of Defence*, United Kingdom Supreme Court, [2017] UKSC 2 (17 January 2017), paras. 149–151 (Lord Mance).

[109] See also "Ways and means for making the evidence of customary international law more readily available", *Yearbook ... 1950*, vol. II (Part Two), p. 370, para. 53.

speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[110]

(4) The term "publicists", which comes from the Statute of the International Court of Justice, covers all those whose writings may elucidate questions of international law. While most such writers will, in the nature of things, be specialists in public international law, others are not excluded. The reference to "the most highly qualified" publicists emphasizes that attention ought to be paid to the writings of those who are eminent in the field. In the final analysis, however, it is the quality of the particular writing that matters rather than the reputation of the author; among the factors to be considered in this regard are the approach adopted by the author to the identification of customary international law and the extent to which his or her text remains loyal to it. The reference to publicists "of the various nations" highlights the importance of having regard, so far as possible, to writings representative of the principal legal systems and regions of the world and in various languages when identifying customary international law.

(5) The products of international bodies engaged in the codification and development of international law may provide a useful resource in this regard.[111] Such collective bodies include the Institute of International Law (*Institut de droit international*) and the International Law Association, as well as international expert bodies in particular fields. The value of each output needs to be carefully assessed in the light of the mandate and expertise of the body concerned, the extent to which the output seeks to state existing law, the care and objectivity with which it works on a particular issue, the support a particular output enjoys within the body, and the reception of the output by States and others.

Part Six
Persistent objector

Part Six comprises a single draft conclusion, on the persistent objector rule.

Conclusion 15
Persistent objector

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.

3. The present draft conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).

Commentary

(1) Rules of customary international law, "by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour".[112] Nevertheless, when a State has persistently objected to an *emerging* rule of customary international law, and maintains its objection after the rule has crystallized, that rule is not opposable to it. This is sometimes referred to as the persistent objector "rule" or "doctrine" and not infrequently arises in connection with the identification of rules of customary international law. As the draft conclusion seeks to convey, the invocation of the persistent objector rule is subject to stringent requirements.

---

[110] *The Paquete Habana and The Lola*, US Supreme Court 175 US 677 (1900), at p. 700. See also *The Case of the S.S. "Lotus"* (footnote 25 above), at pp. 26 and 31.

[111] The special consideration to be given to the output of the International Law Commission is described in paragraph (2) of the general commentary to the present Part (Part Five) above.

[112] *North Sea Continental Shelf* (see footnote 9 above), at pp. 38–39, para. 63. This is true of rules of "general" customary international law, as opposed to "particular" customary international law (on which see draft conclusion 16, below).

(2) The persistent objector is to be distinguished from a situation where the objection of a significant number of States to the formation of a new rule of customary international law prevents its crystallization altogether (because there is no general practice accepted as law).[113]

(3) A State objecting to an emerging rule of customary international law by arguing against it or engaging in an alternative practice may adopt one or both of two stances: it may seek to prevent the rule from coming into being; and/or it may aim to ensure that, if it does emerge, the rule will not be opposable to it. An example would be the opposition of certain States to the then-emerging rule permitting the establishment of a maximum 12-mile territorial sea. Such States may have wished to consolidate a three-, four- or six-mile territorial sea as a general rule, but in any event were not prepared to have wider territorial seas enforced against them.[114] If a rule of customary international law is found to have emerged, it will be for the State concerned to establish the right to benefit from persistent objector status.

(4) The persistent objector rule is not infrequently invoked and recognized, both in international and domestic case law[115] as well as in other contexts.[116] While there are differing views, the persistent objector rule is widely accepted by States and writers as well as by scientific bodies engaged in international law.[117]

(5) Paragraph 1 makes it clear that the objection must have been made while the rule in question was in the process of formation. The timeliness of the objection is critical: the State must express its opposition before a given practice has crystallized into a rule of customary international law, and its position will be best assured if it did so at the earliest possible moment. While the line between objection and violation may not always be an easy one to draw, there is no such thing as a subsequent objector rule: once the rule has come into being, an objection will not avail a State wishing to exempt itself.

---

[113] See, for example, *Entscheidungen des Bundesverfassungsgerichts* (German Federal Constitutional Court), vol. 46 (1978), Judgment of 13 December 1977, 2 BvM 1/76, No. 32, pp. 34–404, at pp. 388–389, para. 6 ("This concerns not merely action that a State can successfully uphold from the outset against application of an existing general rule of international law by way of perseverant protestation of rights (in the sense of the ruling of the International Court of Justice in the Norwegian *Fisheries case* ...; instead, the existence of a corresponding general rule of international law cannot at present be assumed").

[114] In due course, and as part of an overall package on the law of the sea, States did not in fact maintain their objections. While the ability effectively to preserve a persistent objector status over time may sometimes prove difficult, this does not call into question the existence of the rule reflected in draft conclusion 15.

[115] See, for example, the *Fisheries case* (footnote 46 above), at p. 131; *Michael Domingues v. United States*, Case No. 12.285 (2002), Inter-American Commission on Human Rights, Report No. 62/02, paras. 48 and 49; *Sabeh El Leil v. France* [GC], no. 34869/05, European Court of Human Rights, 29 June 2011, para. 54; WTO Panel Reports, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R and WT/DS293/R, adopted 21 November 2006, at p. 335, footnote 248; and *Siderman de Blake v. Republic of Argentina*, United States Court of Appeals for the Ninth Circuit, 965 F.2d 699; 1992 U.S. App., at p. 715, para. 54.

[116] See, for example, the intervention by Turkey in 1982 at the Third United Nations Conference on the Law of the Sea, document A/CONF.62/SR.189, p. 76, para. 150 (available from http://legal.un.org/diplomaticconferences/lawofthesea-1982/Vol17.html); United States Department of Defense, *Law of War Manual*, Office of General Counsel, Washington D.C., December 2016, at pp. 29–34, sect. 1.8 (Customary international law), in particular at p. 30, para. 1.8 ("Customary international law is generally binding on all States, but States that have been persistent objectors to a customary international law rule during its development are not bound by that rule") and p. 34, para. 1.8.4.

[117] The Commission itself recently referred to the rule in its Guide to Practice on Reservations to Treaties, where it stated that "a reservation may be the means by which a 'persistent objector' manifests the persistence of its objection; the objector may certainly reject the application, through a treaty, of a rule which cannot be invoked against it under general international law" (see paragraph (7) of the commentary to guideline 3.1.5.3, *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10/Add.1)).

(6) If a State establishes itself as a persistent objector, the rule is not opposable to it for so long as it maintains the objection; the expression "not opposable" is used in order to reflect the exceptional position of the persistent objector. As the paragraph further indicates, once an objection is abandoned (as it may be at any time, expressly or otherwise), the State in question becomes bound by the rule.

(7) Paragraph 2 clarifies the stringent requirements that must be met for a State to establish and maintain persistent objector status *vis-à-vis* a rule of customary international law. In addition to being made before the practice crystallizes into a rule of law, the objection must be clearly expressed, meaning that non-acceptance of the emerging rule or the intention not to be bound by it must be unambiguous.[118] There is, however, no requirement that the objection be made in a particular form. A clear verbal objection, either in written or oral form, as opposed to physical action, will suffice to preserve the legal position of the objecting State.

(8) The requirement that the objection be made known to other States means that the objection must be communicated internationally; it cannot simply be voiced internally. It is for the objecting State to ensure that the objection is indeed made known to other States.

(9) The requirement that the objection be maintained persistently applies both before and after the rule of customary international law has emerged. Assessing whether this requirement has been met needs to be done in a pragmatic manner, bearing in mind the circumstances of each case. The requirement signifies, first, that the objection should be reiterated when the circumstances are such that a restatement is called for (that is, in circumstances where silence or inaction may reasonably lead to the conclusion that the State has given up its objection). It is clear, however, that States cannot be expected to react on every occasion, especially where their position is already well known. Second, such repeated objections must be consistent overall, that is, without significant contradictions.

(10) Paragraph 3 provides expressly that draft conclusion 15 is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*). The commentary to draft conclusion 1 already makes clear that all of the present draft conclusions are without prejudice to questions of hierarchy among rules of international law, including those concerning peremptory norms of general international law (*jus cogens*), or questions concerning the *erga omnes* nature of certain obligations.[119]

Part Seven
Particular customary international law

Part Seven consists of a single draft conclusion, dealing with particular customary international law (sometimes referred to as "regional custom" or "special custom"). While rules of general customary international law are binding on all States, rules of particular customary international law apply among a limited number of States. Even though they are not frequently encountered, they can play a significant role in inter-State relations, accommodating differing interests and values peculiar to only some States.[120]

Conclusion 16
Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves.

---

[118] See, for example, *C v. Director of Immigration and another*, Hong Kong Court of Appeal, [2011] HKCA 159, CACV 132-137/2008 (2011), at para. 68 ("Evidence of objection must be clear").

[119] See paragraph (5) of the commentary to draft conclusion 1, above.

[120] It is not to be excluded that such rules may evolve, over time, into rules of general customary international law.

Commentary

(1) That rules of customary international law that are not general in nature may exist is undisputed. The case law of the International Court of Justice confirms this, having referred, *inter alia*, to customary international law "particular to the Inter-American Legal system"[121] or "limited in its impact to the African continent as it has previously been to Spanish America",[122] "a local custom",[123] and customary international law "of a regional nature".[124] Cases where the identification of such rules was considered include the *Colombian-Peruvian asylum case*[125] and the *Right of Passage* case.[126] The term "particular customary international law" refers to these rules in contrast to rules of customary international law of general application. It is used in preference to "particular custom" to emphasize that the draft conclusion is concerned with rules of law, not mere customs or usages; there may well be "local customs" among States that do not amount to rules of international law.[127]

(2) Draft conclusion 16 has been placed at the end of the set of draft conclusions since the preceding draft conclusions generally apply also in respect of the determination of rules of particular customary international law, except as otherwise provided in the present draft conclusion. In particular, the two-element approach applies, as described in the present commentary.[128]

(3) Paragraph 1, which is definitional in nature, explains that particular customary international law applies only among a limited number of States. It is to be distinguished from general customary international law, that is, customary international law that in principle applies to all States. A rule of particular customary international law itself thus creates neither obligations nor rights for third States.[129]

(4) Rules of particular customary international law may apply among various types of groupings of States. Reference is often made to customary rules of a regional nature, such as those "peculiar to Latin-American States" (the institution of diplomatic asylum commonly being cited).[130] Particular customary international law may cover a smaller geographical area, such as a sub-region, or even bind as few as two States. In the *Right of Passage* case the International Court of Justice explained that:

> It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.[131]

Cases in which assertions of such rules of particular customary international law have been examined have concerned, for example, a right of access to enclaves in foreign territory;[132]

---

121 *Military and Paramilitary Activities in and against Nicaragua* (see footnote 1 above), at p. 105, para. 199.

122 *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 565, para. 21.

123 *Case concerning rights of nationals of the United States of America in Morocco* (see footnote 23 above), at p. 200; and *Case concerning Right of Passage over Indian Territory* (see footnote 13 above), at p. 39.

124 *Dispute regarding Navigational and Related Rights* (see footnote 21 above), at p. 233, para. 34.

125 *Colombian-Peruvian asylum case* (see footnote 12 above).

126 *Case concerning Right of Passage over Indian Territory* (see footnote 13 above).

127 See also draft conclusion 9, paragraph 2, above.

128 The International Court of Justice has treated particular customary international law as falling within Article 38, paragraph 1 (b), of its Statute: see *Colombian-Peruvian asylum case* (footnote 12 above), at pp. 276–277.

129 The position is similar to that set out in the provisions of the 1969 Vienna Convention concerning treaties and third States (Part III, sect. 4).

130 *Colombian-Peruvian asylum case* (see footnote 12 above), at p. 276.

131 *Case concerning Right of Passage over Indian Territory* (see footnote 13 above), at p. 39.

132 *Ibid.*, p. 6.

a co-ownership (condominium) of historic waters by three coastal States;[133] a right to subsistence fishing by nationals inhabiting a river bank serving as a border between two riparian States;[134] a right of cross-border/international transit free from immigration formalities;[135] and an obligation to reach agreement in administering the generation of power on a river constituting a border between two States.[136]

(5) While some geographical relationship usually exists between the States among which a rule of particular customary international law applies, that may not necessarily always be the case. The expression "whether regional, local or other" is intended to acknowledge that although particular customary international law is mostly regional, subregional or local, there is no reason in principle why a rule of particular customary international law should not also develop among States linked by a common cause, interest or activity other than their geographical position, or constituting a community of interest, whether established by treaty or otherwise.

(6) Paragraph 2 addresses the substantive requirements for identifying a rule of particular customary international law. In essence, determining whether such a rule exists consists of a search for a general practice prevailing among the States concerned that is accepted by them as governing their relations *inter se*. The International Court of Justice in the *Colombian-Peruvian asylum* case provided guidance on this matter, holding with respect to the argument by Colombiaas to the existence of a "regional or local custom particular to Latin-American States" that:

> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law".[137]

(7) The two-element approach requiring both a general practice and its acceptance as law (*opinio juris*) thus also applies in the case of identifying rules of particular customary international law. In the case of particular customary international law, however, the practice must be general in the sense that it is a consistent practice "among the States concerned", that is, all the States among which the rule in question applies. Each of these States must have accepted the practice as law among themselves. In this respect, the application of the two-element approach is stricter in the case of rules of particular customary international law.

---

[133] See the claim by Honduras in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992*, p. 351, at p. 597, para. 399.

[134] *Dispute regarding Navigational and Related Rights* (see footnote 21 above), at pp. 265–266, paras. 140–144; see also Judge Sepúlveda-Amor's Separate Opinion, at pp. 278–282, paras. 20–36.

[135] *Nkondo v. Minister of Police and Another*, South African Supreme Court, 1980 (2) SA 894 (O), 7 March 1980, *International Law Reports*, vol. 82, pp. 358–375, at pp. 368–375 (Smuts J. holding that: "There was no evidence of long standing practice between the Republic of South Africa and Lesotho which had crystallized into a local customary right of transit free from immigration formalities" (at p. 359)).

[136] *Kraftwerk Reckingen AG v. Canton of Zurich and others*, Appeal Judgment, BGE 129 II 114, ILDC 346 (CH 2002), 10 October 2002, Switzerland, Federal Supreme Court [BGer]; Public Law Chamber II, para. 4.

[137] *Colombian-Peruvian asylum case* (see footnote 12 above), at pp. 276–277.